PREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1969.

No. 427

DEFIANCE INDUSTRIES, INC.
and B.S.F. COMPANY,

Petitioners,

and

ROBERT H. HUFFINES, JR., EDWARD KROCK
and VICTOR MUSCAT

v.

DEBORAH TANZER and WILLIAM PRICKETT,
RECEIVER PENDENTE LITE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioners, Defiance Industries, Inc. ("Defiance") and B.S.F. Company ("B.S.F.") pray that a writ of certiorari issue to the United States Court of Appeals for the Third Circuit to review its judgment in this case.

OPINIONS BELOW.

The opinion of the Court of Appeals, set forth in Appendix A, A-1 to A-4, *infra,* is not reported. The United States District Court for the District of Delaware rendered no opinion.

JURISDICTION.

The judgment of the Court of Appeals, set forth in Appendix B, A-5 to A-6, *infra*, was entered June 10, 1969. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTION PRESENTED.

Under 28 U. S. C. § 2001 a federal court may not confirm a private judicial sale of realty unless it first orders appraisal of the property and publication of the terms of sale at least ten days before confirmation. Under 28 U. S. C. § 2004 a federal court must follow the same procedure before confirming a judicial sale of personalty "unless the court orders otherwise". The question presented is:

> Whether a federal court, under 28 U. S. C. § 2004 and consistent with the Due Process Clause of Amendment V to the United States Constitution, has discretion to confirm a private judicial sale of corporate stock having no readily ascertainable market value, in the custody of a Receiver pendente lite, without first requiring an appraisal of the stock and publication of the terms of sale, and without providing in advance for orderly bidding?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

Amendment V to the United States Constitution pertinently provides that no person shall "be deprived of . . . property without due process of law." Relevant provisions of the Federal Judicial Sales Act, 27 Stat. 741, as amended, 28 U. S. C. §§ 2001 and 2004, are set forth in Appendix C, A-7 to A-8, *infra*.

STATEMENT OF THE CASE.

On December 24, 1968, the United States District Court for the District of Delaware ("District Court") ordered a sale of 146,228 shares of American Steel and Pump Corporation ("A.S.P.")[1] to David Morgan and Carl Glickman ("Morgan-Glickman") for $3,550,000 or $24.27 per share (395a-402a).[2] What is crucial is the manner in which this sale was allowed to occur.

The basic facts are undisputed. Petitioner B.S.F., a Delaware corporation, owned the 47% interest in A.S.P. which was sold (94a, 98a). Petitioner Defiance, an Ohio corporation, is B.S.F.'s principal (32%) stockholder. Respondent Deborah Tanzer is a B.S.F. shareholder who in March, 1966 filed a derivative action on behalf of B.S.F. in the District Court. As a result of that derivative litigation, respondent William Prickett was appointed Receiver pendente lite for B.S.F. on July 12, 1968 (3a-10a).

At the time of the Receiver's appointment, B.S.F. had overdue bank loans, other debts, and certain outstanding debentures which would fall due in December, 1969. Since B.S.F. had no cash with which to meet these obligations, the Receiver decided to sell B.S.F.'s 47% interest in A.S.P., even though he was merely a Receiver pendente lite and the case itself had not yet been tried (12a-23a; 95a-200a).

On December 5, 1968, the Receiver, *without prior consultation with the District Court or notice to B.S.F. shareholders,* entered into a private contract with The Seagrave Corporation ("Seagrave") to sell the A.S.P. shares for $20.25 per share, subject to court approval by December 24, 1968 (24a-34a; 127a-128a). The Seagrave offer was

1. Representing a 47% interest in A.S.P.

2. References to "(. . . a)" are to the pages of the Appendix to the Briefs filed with the Court of Appeals and included in the record certified by the clerk of that Court being filed with this petition.

one of four offers which had been made to the Receiver since October, 1968 (17a-23a; 123a-128a). Although the Receiver considered the Seagrave offer the best, he admitted that he had never canvassed the market or in any other manner actively solicited offers for the A.S.P. stock (122a-123a; 143a-144a).[3]

Nonetheless, on December 10, 1968 the Receiver presented the Seagrave offer to the District Court for approval (11a). Because the Seagrave contract was expressly conditioned upon District Court approval by December 24, 1968, the District Court fixed a hearing on the offer for December 20, 1968; and directed that notice be sent to B.S.F. stockholders, to the prior offerors, and to certain other persons whose identities are not pertinent (38a-39a).

Petitioners objected to the short hearing date and sought a continuance on the ground that the Receiver had forced the Court to adopt an unconscionably rapid-fire sale procedure (42a-43a). Their motion was denied and the hearing took place on Friday, December 20, 1968, as scheduled (71a).

At the December 20, 1968 hearing the Receiver introduced some lay testimony as to why he thought Seagrave offer was adequate (95a-200a). However, there was no affirmative expert evidence of the value of the A.S.P. shares, and this perfunctory hearing did not constitute an independent financial appraisal of the shares (Appendix A, A-4). Since A.S.P. shares were traded over the counter in an admittedly thin[4] market, there was no ascertainable, reliable market value to be used as an objective measure

3. The first of the four offers at $16 per share, was made by Victor Muscat, a director of A.S.P., former director of B.S.F., and a defendant in the *Tanzer* litigation. Muscat could only be characterized as an insider (123a-124a). The Muscat offer was rejected.

4. The available floating supply of A.S.P. shares was approximately 180,000 shares. During the month between November 15, 1968, only 1017 shares were traded (353a-355a).

of value. Nor did a reliable market value result from the bidding, because adequate opportunity for competitive bidding was never developed. The notice to shareholders did not invite public bidding (40a). Only at the December 20, 1968 hearing, after objections were raised, did the District Court decide to receive further bids, and for that purpose, extended the hearing until the following Monday, December 23, 1968 (265a-269a). However, over the intervening weekend *no invitation for public bidding was ordered by the Court or announced by the Receiver.* When the hearing resumed on December 23, 1968 only one new bidder—Morgan Glickman—had appeared.[5]

The unexplained appearance of Morgan Glickman on December 23 injected the first bona fide competition into the proceeding and caused Seagrave to increase its bid from $20.25 to $24 per share (316a-318a). This dramatic indication of the as-yet undeveloped evidence of value of A.S.P. caused the objectors to renew their objection to the entire proceeding on the ground that a sale under these conditions would be precipitous (293a-295a; 311a-313a; 324a-325a). In overruling these objections, the District Court decided that a sale should take place on that very day (December 23rd) and ordered the submission of final bids by 4:00 P. M. (326a). Final bids were then submitted and the District Court ordered the sale to Morgan-Glickman, whose bid of $24.27 per share represented the highest unconditional offer made up to that point (332a-336a; 414a). No publication of the terms of the Morgan-Glickman sale, to invite higher bids, was ever ordered or had.

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5. In addition to Seagrave, Victor Metal Products Corp., an organization controlled by Victor Muscat, submitted a bid (209a-213a; 332a, 405a-413a). This bid was subject to certain conditions requiring approval by the Securities and Exchange Commission under the Investment Company Act of 1940, which impelled the District Court to reject the bid (213a-215a; 332a-333a).

In affirming, the Court of Appeals held that:

(1) The Federal Judicial Sales Act, 28 U. S. C. § 2004, gives a District Court discretion to dispense with the procedural requirements of § 2001 (i.e., appraisal and public notice), although those requirements should not be dispensed with except under extraordinary circumstances; and that

(2) the circumstances of this case justified the departure by the District Court from the § 2001 procedure. (Appendix A, A-4)

REASONS FOR GRANTING THE WRIT.

1. The court below has decided a novel and important question of federal law which has not been, but should be, decided by this Court. In upholding a private judicial sale of personalty in the custody of the District Court pendente lite, having no ascertainable market value, without prior appraisal or publication of the terms of sale, the Court of Appeals impliedly interpreted 28 U. S. C. § 2004 as conferring upon federal courts almost complete discretion to depart from the procedural requirements of 28 U. S. C. § 2001. While § 2004 contemplates some such discretion, the limits, if any, thereof have never been judicially defined. This first impression question of federal judicial procedure in the sale of personalty, the Petitioners respectfully submit, should be settled by this Court.

2. Furthermore, and apart from its novelty, the question presented is of importance in the administration of federal judicial sales. In a private judicial sale of realty, appraisal and publication of the terms of sale are conditions precedent to confirmation. 28 U. S. C. § 2001. These requirements safeguard against fraud or collusion, and are of such importance that to dispense with them has been held to deprive a court of jurisdiction to confirm the sale. *Acadia Land Co. v. Horuff,* 110 F. 2d 354 (5th Cir. 1940).

Where the private sale is of personalty, these requirements continue to apply "unless the court orders otherwise." Although Congress thus intended to permit some flexibility to depart from § 2001 procedure in private sales of personalty, it cannot be imagined that Congress thereby abrogated the policy inherent in § 2001 of safeguarding against fraud or collusion. The holding of the Court of Appeals undermines that Congressional policy. A proper interpretation of § 2004 would sanction departure from

§ 2001 procedures in private sales of personalty only so long as some objective criterion of valuing the property (such as market value) exists to measure the adequacy of private offers. However, the interpretation of § 2004 by the Court of Appeals, permitting a private sale absent any objective value criterion, places the owner of the property to be sold at the mercy of the buyer and removes all procedural safeguards against fraud and collusion. The instant private sale of corporate stock with no reliable market value, without any appraisal and without notice by publication of the terms of sale, is a disturbing case in point. The Court of Appeals recognized that "the lack of an independent financial appraisal justifying the price causes us some concern" (Appendix A, A-4).

To permit a receiver to make a contract without prior court approval and with a short, coercive deadline compelling a sale without due public notice is to deprive B.S.F. shareholders of their property without due process of law.

If the decision of the court below is allowed to stand, in effect granting federal courts unlimited discretion to set the procedure for private sales of personalty, then the integrity of federal judicial sales will be jeopardized. The extent of allowable departure from § 2001 requirements in private sales of personalty, particularly by a receiver pendente lite, is an issue which it is in the public interest for this Court to decide. That issue is likely to arise whenever personalty is to be sold at private judicial sale, especially in view of the total absence of decisional law on the subject.

3. Finally, the decision of the court below sanctions so far a departure by the District Court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision over the

federal courts. As this Court observed in *Pewabic Mining Co. v. Mason,* 145 U. S. 349, 12 S. Ct. 887, 36 L. Ed. 732, 734:

> "It may be stated generally that there is a measure of discretion in a court of equity both as to the manner and the condition of a sale. . . . The Chancellor will always make such provisions for notice and conditions as will, in his judgment, best protect the rights of all interested and make the sale most profitable to all . . ."

The requirements of appraisal and public notice are consistent with the purposes of protecting the interests of interested parties and of obtaining the highest possible price. *Acadia Land Co. v. Horuff,* 110 F. 2d 354 (5th Cir. 1940); *Read v. Elliott,* 94 F. 2d 55 (4th Cir. 1938); *Reid v. King,* 157 F. 2d 868 (4th Cir. 1946); see *In Re Stanley Engineering Company,* 164 F. 2d 316 (3rd Cir. 1947). The omission of those requirements deprives owners of a procedure designed to yield the highest possible price for their interests, and amounts to an arbitrary deprivation of the property of B.S.F. and its shareholders without due process of law.

Whether and to what extent the judicial procedure utilized here is permissible should be determined by this Court, pursuant to its supervisory power, in the interest of a uniform construction of the standards to be followed by federal courts in private sales of personalty.

CONCLUSION.

For the reasons stated, the writ should be granted.

Respectfully submitted,

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Dated: July 31, 1969.

APPENDICES

APPENDIX A.

Opinion Delivered in the Court Below.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 17738

DEBORAH TANZER

v.

ROBERT H. HUFFINES, JR., EDWARD KROCK, VICTOR MUSCAT, DEFIANCE INDUSTRIES, INC., AND B.S.F. COMPANY

DEFIANCE INDUSTRIES, INC., AND B.S.F. COMPANY,

Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

Argued May 22, 1969

Before FREEDMAN, SEITZ and ALDISERT, *Circuit Judges.*

OPINION OF THE COURT

(Filed June 10, 1969)

PER CURIAM.

Appellants were objectors below to an order of the district court authorizing the Receiver pendente lite to sell the controlling stock which the receivership corporation owned in another corporation. They assert here that the sale was unnecessary and, that in any event, the sale should be invalidated because the procedure adopted was fatally defective and grossly prejudicial to the stockholders. It is agreed that a pendente lite receiver may be authorized to sell assets of the receivership estate if the requisite showing is made. We turn briefly to the facts pertinent to the sale.

The receivership corporation has virtually no cash. It is also in default in its obligations to the extent of approximately $300,000. Nearly all of its assets have been pledged as collateral to secure its liabilities. Furthermore, in December of 1969, about $800,000 worth of its debentures will mature. More than ⅔ of the shares here in issue are pledged against such debentures. In these circumstances, it was incumbent upon the receiver to attempt to find a solution to the corporation's dire financial problems. To that end the Receiver investigated the possibility of a sale of the securities in question. The possibility that the stock might be available for purchase was well known in the financial community. Indeed, the first purchase offer at $16.00 per share came from defendant below, Victor Muscat, who controls appellants as well as the corporation whose stock was ordered sold by the district court. For a discussion of the role of Victor Muscat in these proceedings, see Tanzer v. Huffines, 282 F. Supp. 273 (D. Del. 1968), aff'd., 408 F.2d 42 (3rd Cir., 1969). The Receiver rejected the Muscat offer and later entered into a contract to sell the stock in question to the Seagrave Corporation at $20.25 per share. However, the agreement was made expressly con-

tingent upon approval by the district court on or before December 24, 1968. In view of the deadline, the Receiver requested accelerated approval of the Seagrave offer. By order dated December 10, 1968, the district court fixed a hearing on the offer for December 20, 1968, and directed that notice be given to the stockholders of the corporation as well as to all parties to the litigation and to others designated in the order. During the course of the December 20 hearing the district court made it known that it would welcome other bidders and continued the hearing until December 23, 1968. At the adjourned hearing it was decided that the property would be sold but that the parties could submit bids up to 4:00 p.m. on December 23. When the bids were received the court approved as the highest unconditional bid that of David Morgan and Carl Glickman amounting to somewhat over $24.00 per share. It is the order approving that sale which is now on appeal.

Appellants first contend that the sale was unnecessary because the corporation's debt structure could have been refinanced or other assets of the corporation could have been sold. We have reviewed the evidence pertinent to these contentions and we are entirely satisfied that the district court did not abuse its discretion in concluding that there was "a definite and pressing need for the sale of this stock." We cannot share the appellants' sanguine view as to the feasibility of other less drastic solutions to the company's financial crisis.

Appellants next contend that the procedure under which the sale was conducted requires its disapproval. Appellants rely primarily upon 28 U. S. C. § 2004, which incorporates § 2001 by reference. Those sections contemplate compliance with certain procedures designed to protect the best interest of the estate (e.g., a notice requirement) before a district court may order a sale such as the

one in question here, "unless the court orders otherwise." It is agreed that here the district court did order otherwise, and the issue is whether it was justified in so doing.

We think it is clear that the federal statute does express a preferential course to be followed in connection with a court authorized sale of property and that the district court should not order otherwise except under extraordinary circumstances. We nevertheless recognize that where, as here, the court does proceed apart from the statute the test is still one of whether there has been an abuse of discretion in the circumstances.

We think the district court was justified in expediting the hearing in this case primarily because of the financial condition of the corporation and the deadline fixed by the offeror. Moreover, the court, in order to insure that the receivership estate was getting full value, did use the additional time available to permit even higher offers. While the lack of an independent financial appraisal justifying the price causes us some concern, we believe the importance of such an appraisal in this case is outweighed by the other evidence tending to show that the best price under the circumstances was obtained for the stock. Indeed, the appellants do not articulate a formula which shows that the price received does not represent the fair value of the stock. This is particularly significant here since Victor Muscat was the dominant force in the corporation whose shares were being sold and thus was in a position to testify as to value. We cannot say, therefore, that the district court abused its discretion in authorizing the sale under the facts in this record.

The order of the district court authorizing the sale of the stock will be affirmed.

APPENDIX B.

Judgment Sought to Be Reviewed.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT.

No. 17738.

DEBORAH TANZER

v.

ROBERT H. HUFFINES, JR., EDWARD KROCK, VICTOR MUSCAT, DEFIANCE INDUSTRIES, INC., AND B.S.F. COMPANY

DEFIANCE INDUSTRIES, INC., AND B.S.F. COMPANY,

Appellants.

(D. C. Civil Action No. 3166.)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE.

Present: FREEDMAN, SEITZ and ALDISERT, *Circuit Judges.*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the District of Delaware and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, filed December 24, 1968, which authorized the sale of the stock, be, and the same is hereby affirmed, with costs.

ATTEST: THOMAS F. QUINN,
Clerk.

June 10, 1969

APPENDIX C.

Statutes Involved.

The following is the text of the pertinent provisions of the Federal Judicial Sales Act, 28 U.S.C. §§ 2001 and 2004:

Sec. 2001 [27 Stat. 741, as Amended by 48 Stat. 1119, 49 Stat. 159, 49 Stat. 390, 28 U.S.C. 2001].

"(a) Any realty or interest therein sold under any order or decree of any court of the United States shall be sold as a whole or in separate parcels at public sale at the courthouse of the county, parish, or city in which the greater part of the property is located, or upon the premises or some parcel thereof located therein, as the court directs. Such sale shall be upon such terms and conditions as the court directs.

Property in the possession of a receiver or receivers appointed by one or more district courts shall be sold at public sale in the district wherein any such receiver was first appointed, at the courthouse of the county, parish, or city situated therein in which the greater part of the property in such district is located, or on the premises or some parcel thereof located in such county, parish, or city, as such court directs, unless the court orders the sale of the property or one or more parcels thereof in one or more ancillary districts.

(b) After a hearing, of which notice to all interested parties shall be given by publication or otherwise as the court directs, the court may order the sale of such realty or interest or any part thereof at private sale for cash or other consideration and upon such terms and conditions as the court approves, if it finds

that the best interests of the estate will be conserved thereby. Before confirmation of any private sale, the court shall appoint three disinterested persons to appraise such property or different groups of three appraisers each to appraise properties of different classes or situated in different localities. No private sale shall be confirmed at a price less than two-thirds of the appraised value. Before confirmation of any private sale, the terms thereof shall be published in such newspaper or newspapers of general circulation as the court directs at least ten days before confirmation. The private sale shall not be confirmed if a bona fide offer is made, under conditions prescribed by the court, which guarantees at least a 10 per centum increase over the price offered in the private sale.

(c) This section shall not apply to sales and proceedings under Title 11 or by receivers or conservators of banks appointed by the Comptroller of the Currency."

* * *

Sec. 2004 [27 Stat. 751, as amended by 49 Stat. 160, 49 Stat. 390, 28 U.S.C. § 2004].

"Any personalty sold under any order or decree of any court of the United States shall be sold in accordance with section 2001 of this title, unless the court orders otherwise.

This section shall not apply to sales and proceedings under Title 11 or by receivers or conservators of banks appointed by the Comptroller of the Currency."

SUPREME COURT, U. S.

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DEBORAH TANZER and WILLIAM PRICKETT,
RECEIVER PENDENTE LITE,
Respondents.

BRIEF FOR RESPONDENTS, DEBORAH TANZER AND WILLIAM PRICKETT, RECEIVER PENDENTE LITE OF THE B.S.F. COMPANY.

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BRIEF FOR RESPONDENTS, DEBORAH TANZER AND WILLIAM PRICKETT, RECEIVER PENDENTE LITE OF B. S. F. COMPANY.

OPINION BELOW.

The unreported opinion of the United States Court of Appeals for the Third Circuit is set forth in Appendix A to the Petition, pages A1 to A4. The United States District Court for the District of Delaware did not render an opinion.

QUESTIONS PRESENTED.

1. Did the Court of Appeals correctly construe 28 U. S. C., Section 2004 as authorizing the exercise of discretion by the Federal Courts in a judicial sale of personalty to depart from the procedures statutorily called for in sales of realty if extraordinary circumstances exist?

2. Did the United States District Court for the District of Delaware properly invoke its discretion under 28 U. S. C., Section 2004, consonant with the facts and circumstances of this case, to confirm a sale of personalty without following the procedures statutorily called for in sales of realty?

STATUTES INVOLVED.

Relevant provisions of 28 U. S. C., Sections 2001 and 2004 are set forth in Appendix C to the Petition, pages A7-A8.

STATEMENT OF THE CASE.

On July 12, 1968 the United States District Court for the District of Delaware appointed William Prickett ("the Receiver") as Receiver *pendente lite* of B. S. F. Company ("B. S. F."), a Delaware corporation. 3A-10A.* The reasons for the appointment of the Receiver are set forth in the opinion of the District Court, *Tanzer v. Huffines*, D. C. Del., 1968, 287 F. Supp. 273, and in the opinion of the Third Circuit Court of Appeals affirming the appointment, 3 Cir., 1969, 408 F. 2d 42.

On December 24, 1968 the District Court authorized the Receiver to sell 146,228 shares of the common stock of American Steel and Pump Corporation ("A. S. P.") to David Morgan and Carl Glickman ("Morgan-Glickman") for $3,550,000. PA9-10. In the instant proceeding the petitioners claim that the procedure adopted for the conduct of this sale warrants review by this Court.

While the petitioners have limited their challenge to procedural matters, some description of the events which preceded the sale is called for because the background facts explain and fully justify not only the sale itself, but also, and most pertinently for present purposes, the procedure adopted for the sale. Understandably, the petitioners pay less than slighting attention to the background facts; indeed, their reference thereto is confined to one brief paragraph of the petition (Petition, page 3, paragraph 3).

When the Receiver was appointed, he found B. S. F. bereft of cash (100A-101A), with no prospects of receiving income from its investments. 100A-101A. He also found

* The reference to "A" is to the pages of the Appendix to the briefs filed with the Court of Appeals and included in the record certified by the Clerk of that Court and filed with the petition herein. Reference to "PA" is to the pages of the Appendix to the petition herein and the petition is referred to as "P".

that B. S. F. desperately needed funds to meet its obligations. $800,000 worth of its debentures fall due on December 1, 1969. 102A-103A. $205,000 was owed to two banks. 15A, 106A-107A, 111A-112A. Approximately $122,000 was owed on trade indebtedness, a loan from another bank and to Glen Alden Corporation. 111A-112A, 114A-115A. All the bank loans and these latter liabilities were in default (106A-107A, 111A, 114A-115A); and the indebtedness was constantly increasing because of unpaid interest, commitment fees and other charges. 102A.

B. S. F.'s plight was compounded by the fact that virtually all its assets, with the exception of 17,488 A. S. P. shares, were pledged to secure its liabilities. 101,240 A. S. P. shares were pledged against the debentures. 14A, 99A. 20,000 A. S. P. shares were pledged to the Guaranty Bank of Chicago. 14A, 107A. 7,500 A. S. P. shares were pledged to the Ohio National Bank. 14A, 111A. With the debentures due on December 1, 1969 and the bank loans already in default, something had to be done to avoid a distress sale of the A. S. P. shares which would have caused monumental damage to B. S. F. The A. S. P. shares, pledged against the debentures and bank loans, were not registered under Section 5 of the Securities Act of 1933, 15 U. S. C., Sections 77A, *et seq.* (62A, 93A, 103A, 197A, 108A, 111A) and, accordingly, were not freely tradable; moreover, trading in A. S. P. stock was thin, and a distress sale of any of the A. S. P. shares would necessarily reflect a discount for blockage in a thin market. 173A-174A, 352A-355A. Most importantly, a piecemeal sale of the A. S. P. shares would not reflect the control value inherent in the entire block of stock owned by B. S. F. 105A, 243A. In these circumstances, it is little wonder that the Court of Appeals observed that ". . . it was incumbent upon the Receiver to attempt to find a solution to the corporation's dire financial problems." PA2.

Prior to and after the Receiver's appointment several concerns had made informal inquiries concerning the availability of the A. S. P. shares. 247A-248A. As the Court of Appeals noted: "The possibility that the stock might be available for purchase was well known in the financial community." PA2; *e.g.*, 133A, 205A. Nothing concrete came of these inquiries until November 1968 when, for the first time, firm offers were made for the stock.

The first offer, made on November 6, 1968, emanated from Victor Muscat ("Muscat"), the man largely responsible for B. S. F.'s predicament (*Tanzer v. Huffines, supra,* 408 F. 2d 42). Through control of B. S. F., Muscat controlled A. S. P. and was its chief executive officer. 239A-240A. In fact, in 1968 Muscat drew $61,000 in compensation from A. S. P. 239A-240A. It should be noted that Muscat also controlled Defiance Industries, Inc. ("Defiance") and thus controlled both of the parties (B. S. F. and Defiance) who prosecuted the appeal below and who have filed the instant petition to this Court. See PA2; see also *S. E. C. v. Fifth Avenue Coach Lines, Inc.*, S. D. N. Y., 1968, 289 F. Supp. 3, 11.

Not only did Muscat owe a fiduciary duty to B. S. F. and its stockholders, which he rarely, if ever, honored (*e.g., Norte & Company v. Huffines,* S. D. N. Y., 1968, 288 F. Supp. 855), but also he was intimately knowledgeable about A. S. P. 123A-124A; see PA4. Yet, his November 6, 1968 offer was for only $16.00 per share, more than $8.00 per share below the Morgan-Glickman bid which Muscat, through his controlled companies, B. S. F. and Defiance, hypocritically railed against on the appeal below and, of course, in the petition filed in this Court. The Receiver rejected Muscat's $16.00 per share offer and not even the petitioners have had the temerity to criticize that eminently sound judgment.

In the ensuing four weeks after Muscat's $16.00 per share offer, three substantial members of the business community presented offers ranging between $18.00 and $22.00 per share for the A. S. P. stock; subject to varying conditions. 18A, 19A, 20A, 124A-127A. The offer at $22.00 per share was particularly disadvantageous because it was coupled with a number of completely unacceptable conditions, including (1) the payment of an alleged debt from Wright Machine Corporation ("Wright") to A. S. P., which debt was virtually uncollectible (244A, 362A-363A); (2) a minimal cash deposit with the balance payable in installments (see 126A); and (3) an audit of A. S. P. 36A-37A, 126A.

Having reviewed and considered the views of the business community concerning prices and terms for the purchase of the A. S. P. stock, the Receiver concluded that the offer of the Seagrave Corporation ("Seagrave") was the most favorable because its offering price of $20.25 per share was the highest unconditional cash offer made for the stock. The Seagrave offer was an immediate 100% cash offer, not requiring an audit of A. S. P. nor any representations or warranties or the like to be made by the Receiver or B. S. F. concerning the condition or worth of A. S. P. 124A-125A, 126A-129A.

Seagrave, however, did insist upon a cutoff date of December 21, 1968 for approval of the contract by the District Court. 52A, 57A, 60A, 204A-206A. Through hard bargaining the Receiver was able to persuade Seagrave to extend the cutoff date to December 24, 1968. 52A, 204A-206A.

The contract with Seagrave was signed on December 5, 1968. The Seagrave contract was *expressly conditioned* on approval by the District Court. 24A-34A, 124A-129A. Working assiduously, even with an intervening weekend, the Receiver by December 10, 1968 assembled and prepared

the necessary papers for submission of the offer to the District Court. The Court thereupon ordered the hearing set down for December 20, 1968 with immediate notice of the offer and the hearing going to all interested persons, including the parties to the litigation, all B. S. F. stockholders and the Securities and Exchange Commission. 11A-37A, 38A-42A. The offer was also announced in the financial press. 371A, 80A, 321A.

On December 13, 1968 the petitioners moved the District Court to continue the December 20 hearing. 42A-43A. After full oral argument the Court denied the continuance because, obviously, to grant it would have meant the end of the Seagrave offer and would have mooted the purpose of having a hearing. 44A-71A. Had the petitioners had their way, the District Court would not have even availed itself of an opportunity to pass upon the Seagrave offer.

At the hearing before the District Court a substantial amount of evidence was adduced concerning the value of the A. S. P. stock. Earnings for 1967 and 1968 were approximately $2.00 per share. 175A, 232A. The Receiver used a multiplier of 10 to capitalize these earnings and the petitioners offered no contrary evidence. 177A-178A, 180A-181A. Indeed, A. S. P.'s earnings for the ten years prior to the hearing averaged just under $2.00 per share ($1.92 per share) and in only two years out of the ten (1965 and 1966) were earnings much in excess of $2.00 per share. 376A. The market price for A. S. P. stock was a relatively insignificant factor because trading was very thin and open market trading did not reflect the control value of the entire block of A. S. P. stock owned by B. S. F. 173A-174A. The market price prior to the hearing was approximately $16.00 per share. 173A.

A. S. P. had not paid dividends in the past and had no prospects of paying dividends in the foreseeable future.

98A-99A. In fact, B. S. F. had never received a penny from its $3,000,000 investment in A. S. P. stock. 98A-99A. Book value, based upon the most recent audited statements of A. S. P., with adjustments for indisputably soft items on the balance sheet, was approximately $20.00 per share. 166A-167A, 243A-244A, 362A-363A, 373A, 370A.

Of serious concern to the Receiver and the District Court was the evidence offered of existing and potential depreciation in the value of the A. S. P. stock. As noted, earnings in 1967 and 1968 were considerably lower than the historical highs in 1965 and 1966. A $1,200,000 bank loan had recently been called (249A) and A. S. P.'s inventory and accounts receivable were factored at high interest rates. 249A-250A. Cash was almost non-existent (250A) and both production and sales had slowed down because of the cash shortage. 250A-251A. Moreover, the Receiver had ample reason to believe that Muscat's continuing intervention in A. S. P.'s affairs could only lessen the company's prospects for rehabilitation. 116A-117A, 177A, 252A-253A.

In the light of the substantial body of information concerning A. S. P.'s worth and prospects developed at the hearing, both the District Court and the Court of Appeals concluded that the importance of an independent appraisal, which undoubtedly would have been time consuming and costly (and, of course, B. S. F. had little time and no cash) was "outweighed by the other evidence tending to show that the best price under the circumstances was obtained for the stock." PA4. It is also noteworthy that the three bids on December 23, 1968 (see *infra*), each independent of the others, differed by only $15,000 although an aggregate amount of over $3,500,000 was involved. 331A-332A. Moreover, the petitioners, both in the District Court and in the Court of Appeals, failed to articulate "a formula which shows that the price received does not represent the

fair value of the stock. This is particularly significant here since Victor Muscat was the dominant force in the corporation whose shares were being sold and thus was in a position to testify as to value." PA4.

At the outset of the hearing on December 20, 1968, the District Court expressed its willingness to entertain other bids (72A-75A, 79A, 136A-137A, 162A, 195A) and, indeed, other bids were forthcoming during the course of the hearing. 78A-79A, 331A-332A. The hearing was continued to December 23, 1968, for the purpose of receiving additional bids. At this hearing another bid was received from Seagrave for $3,540,000 (331A); from Victor Metal Products Corporation ("Victor Metal") for $3,555,000 (331A-332A), conditioned, however, upon the approval of the Securities and Exchange Commission (see *infra*), and from Morgan-Glickman for $3,550,000 (approximately $24.27 per share) (331A) without conditions, which latter bid was eventually approved by the District Court as the highest unconditional bid that was made for the A. S. P. stock. 332A-333A, 336A. During the bidding Seagrave and Morgan-Glickman refused to extend the cutoff date beyond December 24, 1968. 204A-209A, 212A-213A, 216A-221A, 311A, 317A, 318A.

As stated above, the Victor Metal bid was conditioned upon the approval of the Securities and Exchange Commission. 213A-214A, 291A. Victor Metal is owned by a Trust of which Muscat is the beneficiary (213A) and his involvement with Victor Metal was the basic reason why its bid was so conditioned. 213A-214A, 291A. Whether the Commission would ever approve the arrangement and how long it might have taken to receive such approval were matters of conjecture. 306A-307A.

In any event, it is clear that the Victor Metal bid was, to all intents and purposes, Muscat's bid and it is noteworthy that this bid was only $5,000 higher than the un-

conditional Morgan-Glickman bid (only $15,000 separated all the December 23, 1968 bids). The pained outcries of Muscat's controlled companies about purported unfairness in the proceedings below come with poor grace in the light of Muscat's actions before and at the District Court hearing. With Muscat an unsuccesful bidder for the A. S. P. stock and facing the loss of his substantial personal emoluments from A. S. P., it can well be said that the appeal below and the petition to this Court reflect, more than anything else, his disappointment in the outcome of the sale. Certainly, the appeal below and the petition to this Court do not reflect in the slightest the plight of B. S. F., the peril hanging over the investment of B. S. F.'s public stockholders, the time limitations confronting the Receiver, the scrupulous attention to due process which characterized the proceedings below, and the absolute fairness of the Morgan-Glickman bid measured by any valuation formula.

ARGUMENT.

The petitioners' entire argument in this Court is premised upon procedural matters, embellished with flowery statements to the effect that allegedly novel questions of procedure deserve review by this Court, that due process rights were violated below and that the judicial process was abused. The fact is that when the petitioners' argument is shorn of these strained generalities, it is self-evident that their complaint here is grounded upon one circumstance only—the petitioners' chagrin that the District Court did exactly what Congress authorized the Federal Courts to do under 28 U. S. C., Section 2004.

28 U. S. C., Section 2004 expressly, unequivocally and unambiguously authorizes the Federal Courts to order the holding of a judicial sale of personalty (as was the case here) apart from the procedures set forth in 28 U. S. C., Section 2001 which governs realty sales. Congress has maintained this distinction between sales of personalty and sales of real estate since at least 1893 when the predecessors to Sections 2001 and 2004 were enacted. *Yazoo v. M. V. R. Co. v. City of Clarksdale,* 257 U. S. 10, 42 S. Ct. 27, 66 L. Ed. 104 (1921). Indeed, although Congress in 1934 significantly amended the provisions dealing with sales of realty to permit private as well as public sales thereof, no substantive change was made in the provisions governing sales of personalty. See *Chase Nat. Bank of City of New York v. Pan American Pet. Co.,* D. C. S. D. Cal., 1934, 9 F. Supp. 394.

Pursuant to the mandate found in Section 2004, the sale of the A. S. P. shares was not conducted as if the shares were real property. This was done not out of whimsy, caprice or indifference to substantive rights; it was done because exigencies of economics and time militated against any unnecessary delay and, even more criti-

cally, against jeopardizing the welfare of B. S. F. and its stockholders by subjecting them to risk and speculation, the necessary consequences of the petitioners' contentions. See District Court's comments at 325A.

The record herein demonstrates that compelling facts prompted the District Court to exercise the discretion expressly granted by Congress to conduct the sale of the A. S. P. shares apart from the procedures which obtain in sales of realty. Those facts are summarized in the Respondents' Statement of the Case, *supra,* and in the opinion of the Court of Appeals (PA1-4) and need not be repeated here. Suffice it to say that the Court of Appeals applied the provisions of Section 2004 to those facts (something which petitioners are understandably reluctant to do) and found that "the district court was justified in expediting the hearing in this case primarily because of the financial condition of the corporation and the deadline fixed by the offeror." PA4.

In applying Section 2004, the Court of Appeals did not, as the petitioners contend, construe the statute to grant "unlimited discretion" to the District Courts to depart from Section 2001 procedures. P8. Quite to the contrary, the Court of Appeals ruled that Section 2001 "does express a preferential course to be followed in connection with a court authorized sale of property and that the district court should not order otherwise except under extraordinary circumstances." PA4. Thus, the Court of Appeals enunciated a standard for conducting sales of personalty which is not only consistent with the entire statutory structure but also achieves a required measure of flexibility (explicit in the legislation in question) when, as in the case at Bar, extraordinary circumstances arise calling for expeditious handling of a sale of personalty, which is exactly what confronted the District Court in this case.

The Court of Appeals also ruled that if extraordinary circumstances exist and a sale of personalty is conducted apart from the procedures set forth in Section 2001, appellate review of the District Court's decision is still measured by the traditional abuse of discretion test. It is the latter ruling which the petitioners most oppose, although their argument is devoid of any sound reasons why the abuse of discretion test should be cast aside in the case of judicial sales.

While the petitioners contend that the limits of the Federal Courts' discretion under Section 2004 is a first impression "question" (P7), it is obvious that their so-called "question" is not a question at all, but rather a call for judicial legislation which, contrary to the clear language of the statute, would confine sales of personalty to minor deviations from the procedure set forth in Section 2001, unless a "market value" for the personalty in question exists, which the petitioners sometimes describe as a "reliable" market value and at other times as an "ascertainable" market value, without ever defining what those terms might mean. And the petitioners' proposed drastic, rigid and, of course, non-statutory limitations upon a sale of personalty must be followed—according to the petitioners—irrespective of compelling circumstances such as need, time limitations, risks, business fluctuations and the like. Obviously, to state the petitioners' position is sufficient to refute it.

The petitioners made an identical demand for judicial legislation before the Court of Appeals, but that Court, quite rightly, refused to pervert its own jurisdiction and the clear Congressional mandate found in Section 2004. In so doing, the Court of Appeals not only properly interpreted the statute, but also followed numerous rulings of this Court and Court of Appeals' decisions standing for the proposition that the District Courts may, indeed, exer-

cise discretion in conducting judicial sales and, particularly, sales of personalty. In *Yazoo, supra,* this Court said in discussing the place where a sale is conducted: "The second section, however, while it directs that personalty shall be sold as provided in the realty section, vests *full discretion* in the Court to sell it elsewhere." (Emphasis added.) In *Stokes v. Williams,* 3 Cir. 1915, 226 F. 148, cert. den. 241 U. S. 681, 36 S. Ct. 728, 60 L. Ed. 1234, the abuse of discretion test was applied in reviewing a District Court sale although (1) it was a private sale; (2) there was no reference to a special master; (3) there was no public notice of the sale, by advertisement or otherwise; and (4) notice was only given to the parties and creditors and stockholders of the corporation in receivership. *Stokes v. Williams, supra,* has been cited with approval on many occasions; to cite as examples only a few of the Court of Appeals decisions apposite to *Stokes,* see *Interstate Oil Co. v. Gormley,* 9 Cir., 1939, 105 F. 2d 431, 434, cert. den. 308 U. S. 626, 60 S. Ct. 383, 84 L. Ed. 522, reh. den. 309 U. S. 694, 60 S. Ct. 512, 84 L. Ed. 1035; *Backus v. Jaffray,* 8 Cir., 1934, 73 F. 2d 823; *Smith v. Hill,* 3 Cir., 1925, 5 F. 2d 188; and *Cockstetter v. Williams,* 9 Cir., 1925, 9 F. 2d 354. See also *Pewabic Mining Co. v. Mason,* 145 U. S. 349, 12 S. Ct. 887, 36 L. Ed. 732, 734.

In short, the Petition herein does not present a novel question of federal procedure or statutory construction. Indeed, it may well be said that the proceedings below exemplify the exercise of sound judicial discretion which Congress has seen fit to leave to the Federal Courts in the field of judicial sales of personalty, if only because mechanics must often be shaped by facts and equities which rigid and inflexible procedures may destroy. Compare sales under the National Bank Act, 12 U. S. C. Section 192.

Moreover, it is hardly likely that "the integrity of federal judicial sales will be jeopardized by allowing the decision below to stand", as the petitioners advocate. P8. The Court of Appeals has ruled that only "extraordinary circumstances" will warrant departure from Section 2001 procedures. It will be a rare litigant, indeed, unless faced with B. S. F.'s dire financial problems and time limitations, who will be able to meet that severe burden.

Having said the above, it is evident that the petitioners' argument that the procedure below was violative of due process and constituted an improper departure from the accepted course of judicial proceedings borders on the frivolous. The Receiver received a fair, reasonable, totally arm's length offer for the A. S. P. stock; he presented the offer to the District Court; notice was given to all interested persons, including the parties, all B. S. F. stockholders and the Securities and Exchange Commission; a full hearing was held to consider the offer; the District Court expressed its willingness to entertain additional bids and did so; and the District Court ultimately approved the highest unconditional bid for the stock. It is clear that the requirements of due process were meticulously observed in the proceedings below and that a rational, thoughtful and judicious decision was handed down, consonant with the needs of B. S. F. and its stockholders, after careful consideration of the evidence and the views of all interested persons. Compare *McRaney v. Riley,* 91 So. 399, 128 Miss. 665, 22 A. L. R. 685, cert. den. 260 U. S. 727, 43 S. Ct. 90, 67 L. Ed. 484 (under the Bankruptcy Act).

One final reason should be noted why the decision below does not warrant review on certiorari. The Receiver said below that B. S. F.'s very survival may well depend upon the outcome of the appeal to the Court of Appeals. B. S. F. desperately needed then and needs now the pro-

ceeds of the instant sale to forestall the ruinous consequences of foreclosure proceedings. Setting aside the sale would be even more ominous to B. S. F. today because only a few months remain before the debentures fall due. There is absolutely no assurance that B. S. F. and its many public stockholders, who are innocent of the blatant self-interest which Muscat brings to these proceedings, will be able to withstand the ravages of distress sales or the hazards of unavailing efforts to raise cash in the fleeting time which will be left to the Receiver if Muscat, through the petitioners, has his way.

CONCLUSION.

For the foregoing reasons the Respondents respectfully submit that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1969.

No. 427.

DEFIANCE INDUSTRIES, INC., et al.,
Petitioners,

v.

DEBORAH TANZER and WILLIAM PRICKETT,
RECEIVER PENDENTE LITE,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

REPLY OF PETITIONERS TO RESPONDENTS' BRIEF IN OPPOSITION.

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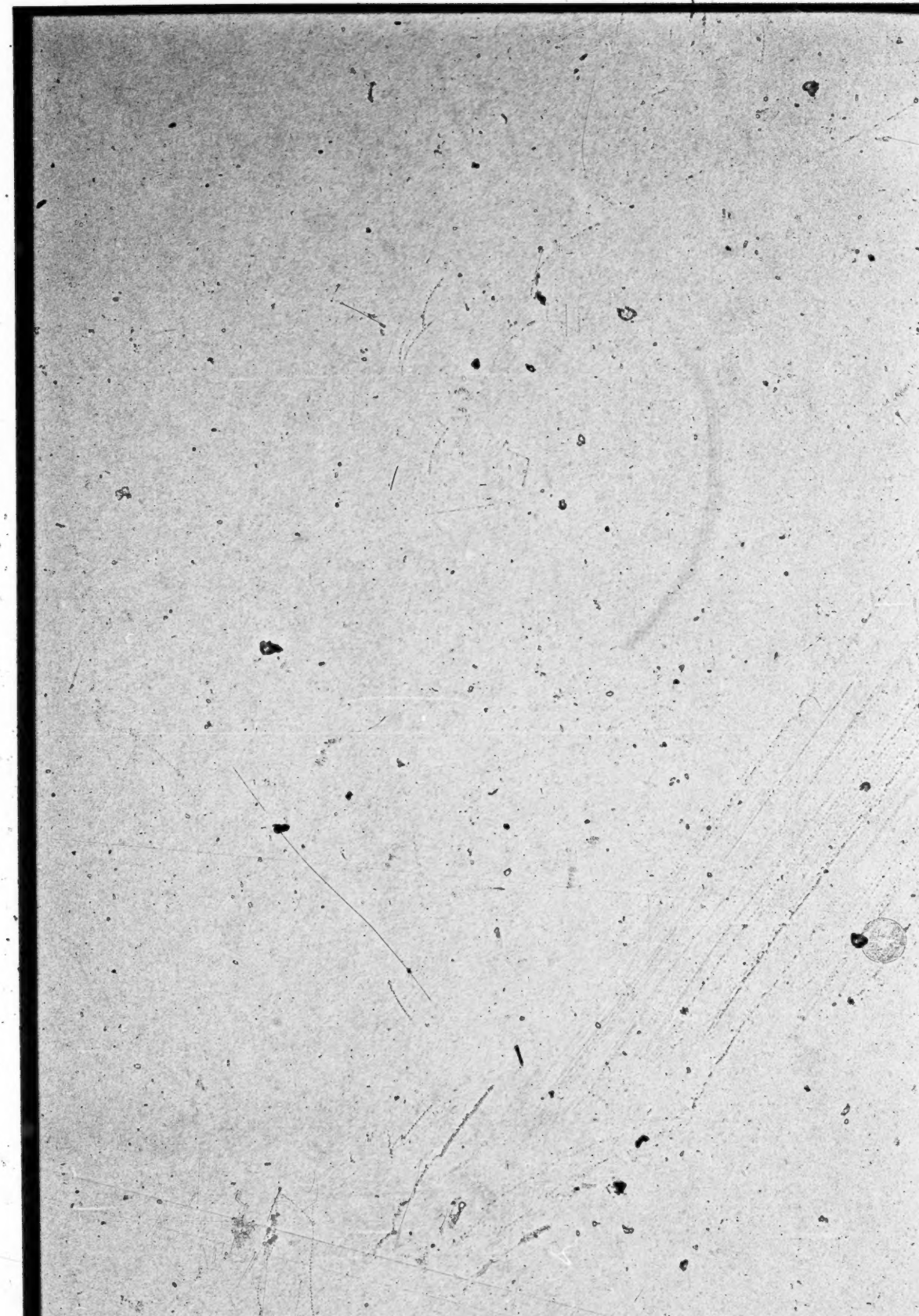

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969.

No. 427.

DEFIANCE INDUSTRIES, INC.
AND B.S.F. COMPANY

Petitioners,

and

ROBERT H. HUFFINES, JR.,
EDWARD KROCK AND VICTOR MUSCAT

v.

DEBORAH TANZER AND WILLIAM PRICKETT,
RECEIVER PENDENTE LITE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

REPLY OF PETITIONERS TO RESPONDENTS' BRIEF IN OPPOSITION.

REPLY STATEMENT OF THE CASE.

Respondents' Brief in Opposition to the instant Petition for Certiorari, although purporting to supply "background facts" (RB 3)*, misleadingly colors the record. In

* The reference to (RB) is to the Respondent's Brief. References to "A", "PA", and "P" (following the abbreviations adopted in footnote, page 3 of Respondents' Brief) are to the Appendix to the briefs filed with the Court of Appeals, the Appendix to the Petition, and the Petition, respectively.

the interest of restoring a proper perspective Petitioners respectfully make the following submission:

(1) Respondents devote space to an elaboration of B.S.F.'s financial difficulties (RB 3-4). Why they do so is obscure, since neither the fact of B.S.F.'s financial difficulty nor the necessity for a sale of the A.S.P. stock are disputed herein. The only area of dispute concerns the procedure under which this sale was permitted to occur, a procedure so prejudicial as to warrant review by this Court.

(2) Giving only secondary attention to the problems caused by the procedure for which they were largely responsible, Respondents devote great energy to an attack upon Victor Muscat (*E.g.*, RB 5). Respondents' innuendo is that because of Muscat's involvement, no issue raised on Petitioners' behalf is genuine. Aside from the specious *ad hominem* quality of this position, the short answer is that Petitioners are corporations whose stock is largely owned by the public. Such public stockholders have a legitimate interest in obtaining the highest possible price for the sale of B.S.F.'s prime asset. To identify Muscat as a controlling stockholder of Petitioners and to call him bad names does not excuse Respondents from responsibility for safeguarding the interests of Petitioners' public stockholders.

(3) Respondents also seem to suggest that because the Seagrave offer was noticed in the mail and announced in the financial press (RB 7), some form of competitive bidding took place. Nothing could be further from fact. The notice directed that any stockholder or interested party should "appear and show cause why if any he has, why the motion of the Receiver *pendente lite* should not be granted" (38A). It did not state, nor did it suggest, that competitive bidding would be invited.

(4) Likewise, the "evidence" of A.S.P.'s value (RB 8) adduced at the December 28th hearing did not constitute an "appraisal" or even permit any conclusion of A.S.P.'s value to B.S.F. Evidence introduced by the Receiver was insubstantial and not probative of value, since no expert skilled in securities or financial analysis testified. The absence of a reliable market value for the A.S.P. stock eliminated that usually helpful yardstick of value. And the rapid-fire hearing schedule afforded Petitioners no opportunity to marshal and present meaningful evidence of value, in accordance with accepted legal standards. Accordingly, the record permits of no rational conclusion as to the value of the A.S.P. stock which was ordered sold on December 24, 1968.

REPLY ARGUMENT.

Respondents argue that the financial situation of B.S.F. required that A.S.P. be sold. Agreed. But the question on the merits is whether the need for that sale justified the use of a procedure which threw all caution to the winds, and which permitted a sale of corporate stock having no ascertainable market value without first requiring an appraisal or advance provision for public competitive bidding. We deferentially suggest that this question is sufficiently important as to require review on Certiorari.

(1) The Respondents argue that Petitioners' construction of § 2004, if adopted, constitutes "judicial legislation", would be "drastic", "rigid" and incorrect (RB 13-14). These arguments are properly addressed to the merits and are improperly proffered here.

(2) Respondents assert that the question presented has already been considered and resolved in *Stokes v. Williams,* 225 Fed. 148 (3rd 1915); *Interstate Oil Co. v. Gormley,* 105 F.2d 431 (9th Cir. 1939); *Backus v. Jaffray,* 73 F.2d 823 (8th Cir. 1934); *Cockstetter v. Williams,* 9 F.2d 354 (9th Cir. 1925); and *Smith v. Hill,* 5 F.2d 188 (3rd Cir. 1925). See RB 14. These cases, we suggest, are off the point. In *Stokes,* unlike the instant case, an appraisal of the property was had, and the applicable statute (unlike § 2004) contained no explicit procedure governing private sales of personalty. In *Hill* and *Gormley* the sale was likewise preceded by an appraisal and, in addition, the notice of the sale invited competitive bidding. *Jaffray* and *Hill* both involved sales of land, not of personalty, a distinction upon which Respondents rely heavily (RB 11); and *Cockstetter* involved a sale of assets of a national bank,

pursuant to a statute entirely unrelated to § 2004 or its predecessors. In short, none of Respondents' cited cases go so far as to permit a sale of personalty without retaining at least some cautionary procedure that enables measurement of the value of the property sold and assures that the price realized is the highest attainable. By not requiring such a procedure below, the District Court and the Court of Appeals radically departed from the accepted and sound practice. They also, we submit, acted in violation of due process.

(3) Respondents' also argue that the decision of the Court of Appeals poses no threat to the integrity of judicial sales, because the number of cases involving "extraordinary circumstances" which permit departure from § 2001 procedure will be infrequent. Such speculations lack merit since the overriding purpose of any judicial sale is to obtain the highest possible price. See authorities cited at Petition p. 9. This purpose should be implemented in all judicial sales, not just in "ordinary" ones. To relax all cautionary procedure because the circumstances are "extraordinary" invites fraud and collusion by encouraging the unscrupulous to manufacture a situation of urgency in order to justify a judicial sale at sacrifice prices.

(4) Respondents characterize Petitioners' attack upon the sale upon due process grounds as "border[ing] on the frivolous" (RB 13). Not only is this unlawyerlike rhetoric, but also the arguments advanced to support it are nonresponsive. A hearing, to be sure, was held, but on such a bang-bang basis that no meaningful evidence of A.S.P.'s value could be marshaled and presented. Also, no appraisal was ordered. Interested parties were notified, but were not invited to bid. The hearing which was held was

devoid of the safeguards designed to assure the highest possible price. Such a hearing hardly meets the requirements of due process.

(5) Lastly, the Receiver argues that B.S.F.'s "very survival" may well depend upon the outcome of this appeal (RB 15). Petitioners deferentially suggest that it comes with poor grace for the Receiver to sell B.S.F.'s prime asset in what is contended to be an illegal manner, and then to argue that only if his illegal act is countenanced will B.S.F. survive. B.S.F.'s interests will not be advanced by a sale of its major asset under a gerry-built procedure which dispenses with the minimum safeguards necessary to attain the highest price.

Petitioners have a substantial stake in B.S.F. To protect that interest Petitioners ask this Court to review what they contend to be the improper sale of B.S.F.'s main asset.

CONCLUSION.

For the reasons advanced herein and in the Petition for Certiorari, the writ should be granted.

Respectfully submitted,

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Dated: September 26, 1969.